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COURT ORDERED PSYCHIATRIC EXAMINATION OF A RAPE VICTIM IN A CRIMINAL RAPE PROSECUTION—OR HOW MANY TIMES MUST A WOMAN BE RAPED?

Roberta J. O'Neale*

"[Rape] is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."1

"No judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician."2

INTRODUCTION

Almost all the special rules surrounding the law of sexual assault and related sex crimes are based on these two famous quotes, or perhaps more aptly "old saws."3 These quotes, by Lord Hale and Dean Wigmore respectively, are the legal reflection of the underlying societal attitudes toward women in general, and rape victims in particular. Similarly, they are the cornerstone of the present day law permitting court ordered psychiatric examinations of rape victims and admission into evidence of testimony concerning such examinations.

Initially, this article provides an overview of the present law governing the use of psychiatric evidence in rape cases, focusing on California's experience. After developing this overview, the article demonstrates that the court ordered psychiatric examination is merely one of a host of special procedures utilized by the legal system in sex offense cases. Then, the article explores the key role traditional attitudes have played in the formulation of the present law, and exposes the lack of foundation for these attitudes given the current realities of rape prosecution. Since these attitudes have little or no basis in

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2. 3A J. WIGMORE, EVIDENCE § 924a, at 737 (J. Chadbourne rev. 1970).
reality, the article concludes that the use of psychiatric examinations based on such assumptions should be severely restricted, if not abandoned.

PRESENT LAW GOVERNING THE USE OF PSYCHIATRIC EXAMINATIONS—AN OVERVIEW

The view that complainants in sex offense cases should be examined psychiatrically to determine their credibility is widely held, and is usually considered progressive because of its use of modern science (i.e., psychiatry). The progressive aspects of using such evidence are dimmed somewhat when one considers that in 1937-38 the American Bar Association Committee on the Improvement of the Law of Evidence recommended that the complaining witness in all charges of sex offenses be subject to a mandatory psychiatric examination prior to trial so as to ascertain "her" probable credibility and that the report thus generated be admissible evidence.4 The report asserted that

Today it is unanimously held (and we say "unanimously" advisedly) by experienced psychiatrists that the complainant woman in a sex offense should always be examined by competent experts to ascertain whether she suffers from some mental or moral delusion or tendency, frequently found especially in young girls, causing distortion of the imagination in sex cases . . . . The warnings of the psychiatric profession, supported as they are by thousands of observed cases, should be heeded by our profession.5

Additionally, many of the old standby tomes concerning the laws of evidence support the American Bar Association's view, Wigmore's in particular.6 Wigmore felt that the rules of evidence should be changed when the witness was a female sex-charge complainant:

But the lamentable thing is that the orthodox rules of evidence in most instances prevent adequate probing of the testimonial mentality of a woman witness, so as to reveal the possible falsity of such charges . . . . [O]nly an in-

4. 3A J. WIGMORE, supra note 2, § 924a, at 746-47.
5. Id. at 747 (emphasis in original).
6. Wigmore cites the A.B.A. recommendation extensively, but neglects to mention that he was the chairman of the five man committee which drafted the recommendation and presented it to the advisory members of the committee at large. 63 A.B.A. ANN. REP. 588. The A.B.A. recommendation itself cites back to Wigmore's comments on the subject. Id.
quiry into the social and mental history will reveal the
degree of credibility. This inquiry the law of evidence
ought to permit to the fullest extent, rejecting the hin-
drance of rules that were framed without an under-standing
of these facts.7

The text of Wigmore's remarks has varied little, if at all,
since its original introduction into Evidence in the 1934 sup-
plement to the second edition, up to the present Chadbourne
revised edition of 1970. Similarly, McCormick continues to
favor such examinations:

In one type of case, namely that of sex offenses, the indis-
pensable value of this kind of testimony has been urged by
Wigmore, and other commentators . . . . The special dan-
ger of sympathy swaying the judgment on credibility in sex
cases points to the need for making possible expert opinion
concerning the credibility of the prosecuting witness in
such cases.8

Apart from the textwriters, many legal commentators have
also spoken in favor of using psychiatric testimony in cases
involving sex offenses.9 These articles seem to share a simulta-
neous distrust of women as rape victim-witnesses and a great
deal of confidence in the powers of psychiatry. It is only in the
most recent commentaries, usually with a feminist perspective,
that the use of such psychiatric examinations are disap-
proved.10 A few other commentators advocate not using such
examinations, not because of belief of, or sympathy for, victims
of sexual assaults, but because they doubt psychiatrists' ability
to evaluate credibility.11

7. Id. at 736-37.
9. See, e.g., Conrad, Psychiatric Lie Detection—The Federal Court's Break With
Tradition, 21 F.R.D. 199 (1957); Hibey, The Trial of a Rape Case: An Advocate's
Analysis of Corroboration, Consent and Character, 11 AM. CRIM. L. REV. 309 (1973);
Juviler, Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach,
48 CALIF. L. REV. 648 (1960); Saxe, Psychiatry, Psychoanalysis, and the Credibility of
Witnesses, 45 NOTRE DAME LAW. 238 (1970); Tuchler, Credibility of a Witness, 8 J. SOC.
Sci. 325 (1963); Comment, Pre-Trial Psychiatric Examination as Proposed Means for
Testing the Complainant's Competency to Allege a Sex Offense, 1957 U. ILL. L.F. 651;
26 IND. L.J. 98 (1950); 43 IOWA L. REV. 650 (1958); 29 OHIO ST. L.J. 505 (1968).
10. See, e.g., Wood, The Victim in a Forcible Rape Case: A Feminist View, 11
AM. CRIM. L. REV. 335 (1973); Comment, supra note 3; Note, The Rape Corroboration
Requirement: Repeal Not Reform, 81 YALE L.J. 1365 (1972).
11. See, e.g., Slovenko, Witnesses, Psychiatry and the Credibility of Testimony,
19 U. FLA. L. REV. 1 (1966); Note, Corroborating Charges of Rape, 67 COLUM. L. REV.
1137 (1967).
In contrast to the many commentaries, there is a lack of case law discussing the propriety of admitting psychiatric testimony on the issue of the victim-witnesses' credibility. Fortunately, no court has adopted the extreme view propounded by Wigmore and the ABA; that all sex offense victims should be forced to undergo mandatory psychiatric examinations. One case came close to adopting such a rule by holding that the uncorroborated testimony of a prosecutrix was insufficient to sustain a conviction of a sex crime, unless she had been examined by a psychiatrist to test her credibility.\textsuperscript{12} However, this case was subsequently overruled.\textsuperscript{13} Nevertheless, the fact that no courts have taken this position may not be because they disagree with such a procedure and the ideas behind it. Courts that have discussed the matter have observed that a blanket rule requiring all complaining witnesses in sex crimes to undergo a psychiatric examination to determine their credibility should come from the legislature.\textsuperscript{14} Though this absolute position has not been adopted, many jurisdictions permit the introduction of psychiatric testimony as to the credibility of a witness in criminal sex cases.\textsuperscript{15} Furthermore, the exclusion of such psychiatric evidence in the context of these cases may constitute reversible error.\textsuperscript{16}

In addition to permitting the introduction of psychiatric evidence, most courts have held that trial judges have the discretion to order the complaining witness in a sex crime to undergo psychiatric examination.\textsuperscript{17} The real meaning of the terms "compel," "order," and "mandatory" are rarely explained and this has generated a great deal of confusion. That is, most courts do not say what the consequences of a victim refusing such an order would be. Certainly the victim could not be physically forced to undergo psychiatric examination. However, she is not really free to choose whether or not to submit to such an order, either. It seems that the alternatives are to acquiesce or be subject to some sort of sanctions of greater or lesser degree. If this were not the case it would be rather silly for the court to "order" an examination. The question of what

\textsuperscript{12} Burton v. State, 232 Ind. 246, 111 N.E.2d 892 (1953).
\textsuperscript{13} Wedmore v. State, 237 Ind. 212, 143 N.E.2d 649 (1957).
\textsuperscript{14} See Annot., 18 A.L.R.3d 1433, 1437 (1967).
\textsuperscript{15} Ballard v. Superior Court, 64 Cal. 2d 159, 174 n.9, 410 P.2d 838, 848 n.9, 49 Cal. Rptr. 302, 312 n.9 (1966) (crime in rape, victim/witness is female, adult).
\textsuperscript{17} See Annot., supra note 14, § 4, at 1433, and cases compiled therein.
the sanction is to be left unanswered by most courts, perhaps because the answer is obvious—the victim would be in contempt and the court would apply the usual punishments, or the charges against the defendant would be dismissed. Other alternatives considered by the courts are making the examination a condition for allowing the victim to testify or commenting to the jury on the victim’s refusal to submit. Thus the victim is in a typical double-bind type situation, or more classically—“heads, I win; tails, you lose.”

California Law Governing the Admissibility of Psychiatric Examinations

California sanctioned court ordered psychiatric examinations in sex violation cases in Ballard v. Superior Court, a unanimous decision authored by Justice Tobriner. An understanding of Ballard and its sequel, People v. Russell, is critical since these cases are widely cited by other state courts, articles, and treatises as some of the prime judicial underpinnings allowing court ordered examinations.

In Ballard, the court held that in sex offense cases psychiatric evidence was admissible to impeach the complaining witness and that the trial judge at his discretion could order the prosecutrix to undergo a psychiatric examination on the question of her credibility. In doing so, the court stated: “[I]n rejecting the polar extremes of an absolute prohibition and an absolute requirement that the prosecutrix submit to a psychiatric examination, we have accepted a middle ground, placing the matter in the discretion of the trial judge.”

In outlining this vast “middle ground” of judicial discretion the court supplied few guidelines and raised a number of questions. Initially, Ballard provided that the trial judge could order the examination if the defendant presented a “compelling reason” for it, or alternatively, “if the circumstances indicate a necessity for an examination.” This “necessity” was said to arise when “little or no corroboration

19. 64 Cal. 2d at 177, 410 P.2d at 849, 49 Cal. Rptr. at 313.
20. Id.
22. 64 Cal. 2d at 177, 410 P.2d at 849, 49 Cal. Rptr. at 313.
23. Id. at 176-77, 410 P.2d at 849, 49 Cal. Rptr. at 313.
24. Id. at 176-77, 410 P.2d at 849, 49 Cal. Rptr. at 313.
support[s] the charge and if the defense raise[s] the issue of the effect of the complaining witness’ mental or emotional condition upon her veracity.” However, these “guidelines” supply little guidance for a trial judge who is petitioned to order a psychiatric examination. They simply provoke more questions such as what level of corroboration does not support the charges, or what circumstances “indicate a necessity.”

Ballard also raised the issue of when the results are admissible at trial, once an examination has been ordered. The court again supplied only a partial answer. It noted that the admissibility of such evidence “depend[ed] upon its posture in the whole picture presented to the trial court” and that if there were compelling reasons for admission the court would abuse its discretion in rejecting it.25

As to some questions, Ballard offered no answers at all: who chooses the psychiatrist (i.e., the prosecution, the court, or the defendant)? must the judge order an examination sua sponte if the conditions warrant? should the victim be informed that she may refuse to undergo the examination and what the consequences of such an action would be?

Perhaps noting the problems generated by Ballard, the California Supreme Court spoke again on the issue of court ordered psychiatric examinations in People v. Russell.26 Russell examined and clarified much of the Ballard analysis. For example, in discussing the judge’s determination as to whether to order a psychiatric examination, the court declared: “This decision must rest for the most part on the court’s judgment as to whether an emotional or mental condition is involved which a body of laymen either would be unable to detect or would be unable to relate in terms of effect to the matter of credibility.”27

The court then discussed in some detail what factors the trial court should use to guide it in deciding whether to admit the psychiatric evidence generated by the examination. As summed up by the court, these factors were: the relevance of the evidence on the issue of credibility, the probability of effective communication of the substance of the expert opinion to the jury, the adequacy of the examination to provide the basis

25. Id. at 177, 410 P.2d at 849, 49 Cal. Rptr. at 313.
26. Id. at 175, 410 P.2d at 848, 49 Cal. Rptr. at 312.
28. Id. at 195, 443 P.2d at 800, 20 Cal. Rptr. at 216.
of a reliable opinion, and the tendency of the evidence to decide rather than inform.\textsuperscript{29}

As can be seen, this opinion is considerably more helpful than \textit{Ballard}, at least in giving some guidelines within which the trial judge may exercise his/her discretion. However, it is still unclear as to just what sort of initial showing the defense must make regarding the victim’s “emotional or mental condition.” Similarly, the court failed to reach the question of who appoints/chooses the psychiatrist, although in this case it was clear from the facts that the psychiatrist was hired by the defense and this was not questioned by the court. The court also gave one final bit of advice: “[T]he legal discretion of the judge should be exercised \textit{liberally in favor of the defendant}.”\textsuperscript{30}

In summary then, \textit{Russell} favors court-ordered psychiatric examinations even more strongly than \textit{Ballard}.

To date, \textit{Ballard} and \textit{Russell} are the sum total of the California Supreme Court’s direct pronouncements on court ordered psychiatric examinations in criminal sex cases. However, in a child molesting case where the victims showed no indication or history of mental illness, the court implied that failure by defense counsel to obtain a psychiatric examination of these victims was inadequate representation by trial counsel and that “only the rarest of cases would excuse counsel from obtaining one.”\textsuperscript{31} This case would seem to support the view that the court strongly favors the use of psychiatric examinations in sex offense cases.

Generally, the appellate court cases have added little or nothing to the California Supreme Court’s standards as to when an examination should be ordered and when the results of that examination should be admitted.\textsuperscript{32} However, \textit{People v.

\textsuperscript{29} \textit{Id.} at 197, 443 P.2d at 802, 20 Cal. Rptr. at 218.
\textsuperscript{31} \textit{People v. Lang}, 11 Cal. 3d 134, 140 n.3, 520 P.2d 393, 397 n.3, 113 Cal. Rptr. 9, 13 n.3 (1974) (sexual assault of child, two 9 year old victim/witnesses).
Blakesley\textsuperscript{33} did add a new twist to the Ballard-Russell analysis. In this case, the victim had already been examined by a psychiatrist pursuant to a Ballard-based court order. During the trial, the defense attacked the victim's credibility generally and his mental health specifically, but defendant did not call the psychiatrist who examined the victim. The prosecution was then allowed by the trial court to call the psychiatrist in rebuttal, in an effort to rehabilitate the victim's credibility and to explain the effect of his mental state. In upholding the trial court, the appellate court declared that Russell was just as applicable to rehabilitation of a witness as to impeachment and that calling the doctor who has examined the victim of a sex crime is a two-way street.\textsuperscript{34}

Significantly, none of the appellate opinions,\textsuperscript{35} including Blakesley, seem to question the basic "wisdom" of the Ballard-Russell analysis nor do they put any meaningful restrictions on the trial court's almost unfettered discretion to order psychiatric examinations. These cases express no concern for the rights or feelings of those compelled to undergo the examination and the subsequent public examination of their psyche in the trial.

PSYCHIATRIC EXAMINATIONS IN THE CONTEXT OF THE GENERAL LAW GOVERNING CRIMINAL SEX CASES

The compelled psychiatric examination of victims in criminal sex cases cannot be viewed in isolation, but must be examined as an outgrowth of a whole complex of laws fashioned especially for rape and related sexual offense cases. Rape is a very special crime—it is the only crime (with minor, often archaic, exceptions, \textit{e.g.}, false promise of marriage) that by law the victim is female and the perpetrator is male.\textsuperscript{36} This injects a sexual bias into the basic definition of the crime. Additionally, the law of rape has essentially been created, interpreted and enforced by men.\textsuperscript{37} A rape trial most often pits the word of

\textsuperscript{33} 26 Cal. App. 3d 723, 102 Cal. Rptr. 886 (1972) (contributing to the delinquency of a minor (consenting homosexuality), minor male victim/witness).
\textsuperscript{34} \textit{Id.} at 728-29, 102 Cal. Rptr. at 887-88.
\textsuperscript{35} See cases cited note 32 supra.
\textsuperscript{36} \textit{E.g.}, CAL. PENAL CODE § 261 (West 1976).
\textsuperscript{37} According to one article, "[a] male-dominated society, with almost all positions of power and influence (in legislatures, administration of law, and the schools of behavioral, medical and social science) occupied by men, tends to establish and perpetuate the woman as a legitimate object for victimization . . . . Rape is behavior that rarely receives legal attention and criminal sanction." Weis & Borges, \textit{Victimology and Rape: The Case of the Legitimate Victim}, 8 ISSUES IN CRIMINOLOGY 71, 107 (1973).
a woman against that of a man, and because of what appears to be a basic distrust of women in such a situation, the law has developed many special laws, rules, and requirements to protect the male defendant. Because of the persistent pressure of women's groups, greatly increased publicity, and a rising level of public consciousness, the rape related laws of California (and some other states) are very much in flux. However, these rules still provide a great deal of insight into the attitudes which spawned court ordered psychiatric examinations.

**Corroboration Requirement**

One of these special rules is the so-called "corroboration requirement." This rule provides that the defendant in a rape case may not be convicted if there is no evidence to corroborate the victim's testimony. It is sometimes statutory and sometimes judge-made law, and is followed in only a minority of American jurisdictions. In these jurisdictions the victim's testimony must be supplemented by other witnesses or circumstantial evidence to sustain a conviction. California aligns with the majority and does not require corroboration by law. Arguably, in practice, the chances of a totally uncorroborated rape charge a) making it to trial, and b) resulting in a conviction are low.

**Resistance Requirement**

A second rape related rule is the resistance requirement which dictates that there must be some showing that the victim resisted the attacker in order to sustain the charge of rape. The intended purpose of this requirement is to show the rap-

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38. As one commentator, in discussing the Model Penal Code's rape provisions, noted: "The predominant interest seems to be protecting men from false complaints, not protecting females from being sexually assaulted or convicting those who are guilty of sexual assault." Bienen, *Rape I*, WOMEN'S RIGHTS L. REP., December 1976, at 45, 54. It should be noted that a detailed historical analysis of Wigmore's § 924a and the sources quoted therein is in progress by the same author.


40. See Note, supra note 10, at 1367.

41. Id.

42. See People v. Gidney, 10 Cal. 2d 138, 73 P.2d 1186 (1937); People v. Meredith, 266 Cal. App. 2d 467, 72 Cal. Rptr. 214 (1968).

43. See N. GAGER & C. SCHURR, SEXUAL ASSAULT: CONFRONTING RAPE IN AMERICA 150 (1976).

ist’s intent to use force and the victim’s nonconsent to the act. California no longer requires the victim to resist to her utmost, the law now says that the woman may determine the extent to which she may safely resist. However, the court (or the jury) still decides in the cold clear light of day if her decision was reasonable.

The resistance requirement supplies a clear illustration of how the law of rape focuses on the victim and what she does, almost to the exclusion of what the defendant does. In part, the unfairness of such a rule is emphasized by a comment in the Model Penal Code, supporting the view that a woman’s fear caused by a threat of violence need not be reasonably grounded: “One who takes advantage of a woman’s unreasonable fears of violence should not escape punishment any more than the swindler who cheats gullible people by false statements which they should have found incredible.” Furthermore this requirement should clearly be reconsidered in the light of statistics which show quite emphatically that the rape victim who resists is much more likely to be injured.

**Impeachment Rules**

Generally speaking, the courts have established much more liberal rules of impeachment in sex offense cases. One court states that “broad cross-examination of the prosecuting witness on prior sexual experience, fabrication, and sexual

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45. Id., 42 Cal. Rptr. at 675.
46. Id. at 168, 42 Cal. Rptr. at 675; People v. Merrill, 104 Cal. App. 2d 257, 262, 231 P.2d 573, 577 (1951); CALIFORNIA JURY INSTRUCTIONS, CRIM. (CALJIC) No. 10.01 (3d rev. ed. 1970).
47. See generally Note, supra note 39, at 1504, 1508, 1516. Or, as one trial judge said to a jury who had just acquitted an accused rapist: “[I]nstead of trying the defendant, you make the poor girl the defendant . . . . They [rape victims] are made the defendant, and they walk out of this courtroom with one thought in their mind: In our courts there is not justice for the victims of rape. And I can’t say that I disagree with them.” Id. at 1500.
fantasy should be allowed.” It is this special liberality that underlies Ballard and that is in part responsible for one of the major differences in the prosecution of sex crimes—the admissibility at trial of the victim's past sexual history. Evidence of the victim's prior reputation for, and acts of, “unchastity” is admissible under two theories: 1) as impeachment evidence because credibility is affected (in women) by sexual activity; and 2) as substantive evidence tending to show consent to the rape, because women who have consented to sexual intercourse in the past are more likely to have consented to this particular act. Only in the crime of rape, and related sex offenses, is such evidence admissible under either theory, and this is the majority rule.

In California, the law concerning past sexual history has changed radically since 1974. Up until the enactment of the Robbins Rape Evidence Law in August of 1974, California courts admitted the victim's past sexual history as evidence relevant both to consent and credibility. With the enactment of this law, section 1103 of the California Evidence Code was amended such that it now prohibits the admission of any evidence of the victim's previous sexual conduct to show consent, with the exception of previous conduct with the defendant. Also, newly added California Evidence Code section 782 makes it procedurally much more difficult for the defendant to bring in the victim's past sexual history on the issue of credibility. The defendant must first submit a written motion and offer of proof as to the relevancy of such evidence. If the judge finds this sufficient, a hearing with the victim is then held out of the presence of the jury. If the judge then finds the evidence relevant and not inadmissible for other reasons, he or she will then

52. See Ballard v. Superior Court, 64 Cal. 2d 159, 173, 410 P.2d 838, 847, 49 Cal. Rptr. 302, 311 (1966).
54. Id.
allow the evidence in, specifying in a court order the particular evidence to be admitted and the nature of the questions to be asked.

According to one of the drafters of the bill, its purpose was to make this kind of evidence very difficult, if not impossible, to get in, and so far it appears to be working just that way. These changes of the evidence law have already been upheld as constitutional by at least one appellate court.

Jury Instructions

In California, the evidence of past sexual history, was also incorporated in a special jury instruction concerning chastity that was given only in rape cases. This instruction provided that the jury could infer that a woman who had consented to intercourse previously would be more likely to consent again and that evidence of her unchaste character goes to both her consent and her credibility. This was changed by the addition, in 1974, to the California Penal Code of section 1127(d) and (e), which forbade the use of such an instruction and the use of the term "unchaste character" in any jury instruction. This was part of the same bill package as the amendments to the evidence code.

The above jury instruction was not the only special rape instruction in California. This famous quote from Lord Hale (who was also well known for his firm belief in witches and his support of their prosecution), was embalmed in California's version of the very common "cautionary" instruction:

A charge such as that made against the defendant in this case is one which is easily made, and once made, difficult to defend against, even if the person accused is innocent.

Therefore, the law requires that you examine the testimony of the female person named in the information with caution.

This instruction was mandatory sua sponte in all sex offense

60. CALJIC No. 10.06 (3d rev. ed. 1970).
61. C. EWEN, WITCHCRAFT AND DEMONIANISM 128, 352 (1933).
cases, and sex offense cases only, although the absence of the instruction did not necessarily give rise to a prejudicial error.43

The underlying rationale of this instruction was that sex crimes most frequently occur in private and thus the only evidence was the victim's testimony.44 However, in 1975, the California Supreme Court disavowed this rationale and held that this instruction "is inappropriate in any context, and the further use of such language is hereby disapproved."45 The court observed that the instruction had outworn its usefulness and had no place in a contemporary California courtroom.46 This view was echoed by the trial judge in this case, who found that the instruction arbitrarily discriminated against women and characterized all rape victims as spiteful, vengeful, vindictive and base.47 It has been replaced with a very mild cautionary instruction to be used across the board in any criminal case which does not require corroboration.48

Despite the recent trend of California and other legal systems toward a body of law less discriminatory towards rape victims, the underlying attitudes which gave rise to the original rape-related rules still have an impact on court decisions. For example, the California Supreme Court shortly after handing down their decision on the cautionary instruction,49 handed down People v. Mayberry.50 The rule of this case was that even if forcible intercourse without consent was proven, the defendant was not guilty of rape if he reasonably and in good faith believed the victim consented. (It should also be noted that the court held that this principle should also apply to kidnapping).51 Because a mistake of fact instruction to this effect was not given, the conviction was overturned, despite the court's concession that the jury believed the victim's account. There is now a new jury instruction to this effect.52

66. Id. at 877, 883, 538 P.2d at 256, 260, 123 Cal. Rptr. at 128, 132.
67. 1975 Hearings, supra note 58, at 23 (remarks of Judge Armand Arabian).
68. CALJIC No. 2.27 (3d rev. ed. 1970).
69. See notes 61-68 and accompanying text supra.
70. 15 Cal. 3d 143, 542 P.2d 1337, 125 Cal. Rptr. 746 (1975).
71. Id. at 156-57, 542 P.2d at 1346, 125 Cal. Rptr. at 754.
72. CALJIC No. 10.23 (3d rev. ed. 1976).
Probably the most distressing aspect of this decision is the factual situation in which the court applied its rule. The victim was approached on the street by a complete stranger, refused his threatening request for sex and his demand that she go with him, and then was threatened, struck, and knocked down. Out of fear and a hope for escape, she played along with him and “put on an act.” Then after further threats and despite her repeated attempts to talk him out of it, he led her to his apartment, barricaded her in, struck her, and sexually assaulted her. She did not resist out of fear and did not run because of an arthritic leg. The man’s brother arrived and also beat and attempted to rape her. She finally escaped and immediately reported the incident to the police. Several witnesses testified that she was badly bruised and swollen in many places.

The implications this case holds for rape victims are frightening. What must a victim do to convince a rapist that she is not consenting to his assault? Must she choose between risking serious injury or losing her life and being unable to convict the rapist? Does the rapist have no responsibility for his acts? This victim did what many victims do—tried to talk her way out to avoid injury and/or rape. This is exactly what the police and women’s self-protection information tells her to do if she is unskilled in fighting. It also could be argued that Mayberry sanctions the admission of the victim’s past sexual history, as known to the rapist, on the theory that if he knew she was “promiscuous,” he could reasonably believe that she consented to intercourse. This would circumvent both the letter and the intent of the new rape evidence laws.

These rape-related rules when coupled with the Ballard-Russell psychiatric examination procedure present the structure of rape law as it stands today. This body of law has both positive and negative aspects; Ballard-Russell is one of the negatives. But the whole body of law surrounding sex offenses both positive and negative, springs from many of the same basic societal attitudes and myths.

73. 15 Cal. 3d at 148, 542 P.2d at 1341, 125 Cal. Rptr. at 749.
74. BAY AREA WOMEN AGAINST RAPE, INFORMATION PACKET (1975) [hereinafter cited as BAWAR PACKET].
75. See Bienen, Mistakes, 7 PHILOSOPHY & PUB. AFF., (to be published); BAY AREA WOMEN AGAINST RAPE, LEGAL INFORMATION FOR RAPE VICTIMS AND ADVOCATES 20 (1977).
76. See notes 55-59 and accompanying text supra.
77. The judiciary has been notably conservative, even as compared with societal attitudes in general. See Note, California Rape Evidence Reform: An Analysis of
RATIONALE UNDERLYING BALLARD AND OTHER SPECIAL RAPE RULES

Those in favor of psychiatric examinations for rape victims and other special rules to protect the defendant in a sexual offense case give a number of specific reasons that they feel show the need for and justify such measures.

Beginning with Hale, there is one refrain that is heard over and over again—rape is easy to charge. All the woman has to do is say it happened. Concomitantly it is almost as frequently held that there are many false charges of rape and many innocent men have gone to jail because of this. Wigmore echoes these sentiments: "Judging merely from the reports of cases in the appellate courts, one must infer that many innocent men have gone to prison because of tales whose falsity could not be exposed." Curiously he cites none of these cases, nor any other authority for this proposition. Significantly, these views are not confined to Wigmore and Hale. Another commentator states that: "False accusations of sex crimes in general, and rape in particular, are generally believed to be much more frequent than untrue charges of other crimes." This author also cites no authority for this statement, and despite this, frequently repeats how common false accusations of rape are. Along similar lines, another commentator notes that: "It often happens in a case of conviction of a sex crime that the prosecuting witness withdraws her accusation." His total authority for this position is one case.

The supposed danger of all those "false" accusations grows out of two basic premises: first, that rape charges are very difficult to disprove, and second, that the jury will be misled by its emotions into convicting innocent men. These false accusations are imagined difficult to disprove because the claimed nature of the crime is one in which eyewitneses are rarely present and reliable evidence is often lacking. The fear is that the defendant will have no way to establish consent.

78. See Bornstein, Investigation of Rape: Medicolegal Problems, 9 Med. Trial Tech. Q. 229, 235 (1963); Hibey, supra note 9, at 309.
79. Comment, supra note 53, at 49.
80. 3A J. Wigmore, supra note 2, § 924a, at 736.
81. Note, supra note 11, at 1138.
82. Id. at 1138-39.
83. 43 Iowa L. Rev. 650, 653 (1958).
84. Note, supra note 11, at 1139.
85. Id.
or lack of penetration, and the trial will be no more than two conflicting stories told under oath.\textsuperscript{86}

The great distrust of the jury arises because of the fear that the "respect and sympathy naturally felt by any tribunal for a wronged female" would cause them not to question the credibility of the victim.\textsuperscript{87} Also, there is concern that the jury would automatically be prejudiced against the defendant because of the great outrage and repugnance that is felt towards the commission of such an offense.\textsuperscript{88} Furthermore, many commentators have said that besides being swayed by their emotions, the jury will also be unable to perceive the victim's lack of veracity, because on the surface her testimony is straightforward and convincing; her underlying pathology cannot be perceived by lay persons (non-psychiatrists) in the courtroom.\textsuperscript{89}

Generally speaking, two main rationales are used to explain this supposed high incidence of false rape charges: first, many women making sex charges simply lie for their own personal reasons, and second, many women making sex charges are mentally ill. The belief that women lie for vindictive and personal reasons is widespread, within the legal profession and without.\textsuperscript{90} A multitude of reasons are advanced for these supposed lies: she is ashamed and guilty because of consenting to intercourse, she is pregnant, she hates the man she accuses, wishful thinking, injured pride, a childish desire for notoriety, revenge, blackmail, she didn't get paid, etc. ad nauseum.\textsuperscript{91}

The view is also widespread that "this type of litigation is especially likely to involve pathological witnesses, the prosecuting witness in particular."\textsuperscript{92} What is especially interesting is the multiplicity of psychopathologies peculiar to women, that are said to underly the many false charges women make. Wigmore's beliefs about female psychopathology are cited over and over again to the point where it seems that if Wigmore says it, it must be true. According to Wigmore, one dangerous form of female mental abnormality, well known to psychiatrists,

\begin{footnotes}
\footnotetext[86]{Id.; Note, supra note 10, at 1382.}
\footnotetext[87]{3A J. Wigmore, supra note 2, § 924a, at 736.}
\footnotetext[88]{Note, supra note 11, at 1139; 26 Ind. L.J. 98, 100 (1950).}
\footnotetext[89]{3A J. Wigmore, supra note 2, § 924a, at 736; Comment, supra note 9, at 651; Saxe, supra note 9, at 238; 26 Ind. L.J. 98, 101-02 (1950).}
\footnotetext[90]{Oelsner, Law of Rape: 'Because Ladies Lie,' N.Y. Times, May 14, 1972, § E, at 5, col. 5.}
\footnotetext[91]{See, e.g., Juviler, supra note 9, at 674; Oelsner, supra note 90; Note, supra note 11, at 1138; Note, supra note 10, at 1373; 26 Ind. L.J. 98, 103 (1950).}
\footnotetext[92]{Juviler, supra note 9, at 674.}
\end{footnotes}
"consists in a disposition to fabricate irresponsibly charges of sex offenses against persons totally innocent."93 It is considered dangerous because it does not affect other "mental operations."94 Wigmore seems to feel that there are a number of females of excessive or perverted sexuality who lie plausibly about sex charges:95 "The unchaste . . . mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or victim."96 In support of this point Wigmore cites Dr. Karl Menninger, who is of the opinion that almost all women fantasize rape and many neurotic women translate their fantasies into belief.97

Wigmore's beliefs are based on five case studies (all involving young women aged seven through nineteen) cited in an obscure 1915 textbook and on letters and monographs composed by psychiatrists, the most recent dated 1933. Dr. Menninger cited only one case in support of his views. The datedness and societal bias of his comments are exemplified by his characterization of this woman, unmarried and in her late twenties, as a "spinster."98

Again, legal commentators have followed Wigmore's lead. Dr. W. Overholser, a noted psychiatrist and the author of the Issac Ray Award book, The Psychiatrist and the Law, also says that many rape charges are based on personality disturbances, but for authority for his attitudes he merely cites back to Wigmore and his sources.99 Alternately, another author suggests that psychiatrists agree these "false charges" of sex offenses often result from an abnormal mental condition called "pseudologia phantastica"100 where "[t]he witness is usually plausible and convincing, often because she believes her statements to be true. She has not, however, lost contact with reality."101

An additional rationale offered to explain why women make "false" rape charges does not conclude that she lied in

93. 3A J. Wigmore, supra note 2, § 934a, at 767.
94. See id.
95. See id. § 924a, at 737.
96. Id. at 736.
97. Id. at 744.
98. Id.
99. W. Overhouser, The Psychiatrist and the Law 51-54 (1953). Overholser does give three examples of false accusations, but none are psychopathologically caused; all are young girls, two are caused in part by police pressure on the girls.
100. 43 Iowa L. Rev. 650, 651 (1958).
101. Id. at 651 n.7 (emphasis added).
making the charge precisely, but that she unconsciously set up the situation and is guilty of an unconscious complicity. This is Slovenko's theory of the "riddance mechanism." 102 Under this theory women are under such constant fear and anxiety that they will be raped that some women allow themselves to be raped in order "to get it over with" and rid themselves of their anxiety. 103 Because of contributory behavior and/or lack of resistance in such a situation, this is not considered really a "true" rape, and it is not felt that the offender deserves to be punished so severely as a "true" rapist would be. 104 (Slovenko also notes: "Not unusually, the wish [for rape] may be very near the fear.") 105 Slovenko offers little but anecdotal analogies to back up his ideas; this seems little more than a reflection of the male fantasy that all women want to be raped. As one article notes, the many scientific books that stress an unconscious "rape wish" make "no distinction between determined seduction and violent rape." 106

A common thread underlying many of these rationales is that all women fantasize rape. This premise leads the theorists to the conclusion that all women want to be raped and as a result they either believe they have been raped when they have not or go out and get themselves raped. However, there is no credible psychological evidence, nor any logical necessity, that translates such fantasies into actual behavior and beliefs. 107 Slovenko himself recognizes this when he discusses male fantasies: 

"[T]he fantasy of rape, which nearly every male has entertained, is one thing, but the deed is quite another. It is a big step when one goes from wish to deed, from a wish to rape to that of an actual raping. Religious teaching is misdirected when it fails to distinguish thought and deed and treats them as equal." 108

Similarly, some women do fantasize rape, 109 but where this information leads many commentators is patently incorrect

103. Id.
105. Slovenko, supra note 102, at 127 n.49.
106. Weis & Borges, supra note 37, at 79.
107. Id. at 92.
108. Slovenko, supra note 102, at 49.
109. BAWAR PACKET, supra note 74 ("A Few Rape Myths"); see generally S. BROWNMiller, AGAINST OUR WILL 322-33 (1975).
and unsupported. A woman remains in control in a fantasy and is unlikely to fantasize sexual intercourse with a mate who, in addition to not being chosen or desired, inflicts her with pain.\footnote{110} As noted by one author, who discussed sex fantasies with several dozen women, there is a marked distinction between a sexual fantasy and forcible rape:

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Better than half described rape; but it was always in the precise circumstances, and by the specific men, of their choice. It was absolutely clear from the nature of the material that these fantasies served no wish to be genuinely raped, but a wish to feel \textit{guiltless}—"I can't blame myself, if he made me do it"—in a desired sexual encounter. Still, the fantasy exists, and it feeds the myth.\footnote{111}
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Additionally, there is an unfortunate tendency by many writers, even those sympathetic to the women's point of view, to equate fantasizing, especially of rape, with some form of mental illness.\footnote{112}

Another common thread underlying many of the rationales offered to explain why women make "false" rape charges, is a level of male hostility towards women who charge rape. Though this attitude is difficult to comprehend, it perhaps explains in part the harshness of the special rape rules. It grew out of a deep-seated fear and distrust of women and their sexuality, which developed in nineteenth century America, and continued into this century.\footnote{113} It should be noted that this is the society that shaped Wigmore's and his contemporaries' beliefs about women and rape. This attitude is also mirrored in state-

\footnotesize{110. Weis \& Borges, \textit{supra} note 37, at 92.} \footnotesize{111. Lear, Q. \textit{If You Rape a Woman and Steal Her TV, What Can They Get You For in New York? A. Stealing Her TV, N.Y. Times, Jan. 30, 1972, § 6 (Magazine), at 63, col. 1.} \footnotesize{112. Note, \textit{supra} note 10, at 1378.} \footnotesize{113. See G.J. Barker-Befield, \textit{The Horrors of the Half-Known Life—Male Attitudes Toward Women and Sexuality in Nineteenth-Century America} (1976).} From the late nineteenth century, up into the 1930's and 1940's, sexual surgery (clitoridectomy, female castration, hysterectomy, etc.) was still performed on women (by male gynecologists) in order to cure psychological disorders (such as promiscuity, masturbation) and was used as a tool to restore rebellious women to their standard submissive role in society. See \textit{id.} at 120-32. Woman's sexuality, and her sexual organs, were perceived as dangerous to men and also believed to make women specially liable to mental illness. \textit{Id.} Another author has noted this connection between the laws about and attitudes toward rape, and the nineteenth century morality: "[T]he case law [of rape] . . . incorporates moral concepts prevalent at the time the law was being formulated. The moral code of the nineteenth century strongly condemned sexual relations outside of marriage. Women who had engaged in such relations were considered morally depraved . . . ." Note, \textit{supra} note 77, at 1551; \textit{see also} \textit{id.} at 1569.}
ments by recent authors, as illustrated by one legal writer's comments about rape complainants: "[N]othing should be left to the conceivably unreasonable opinion of the alleged victim . . . [T]he resistance standard] goes far toward removing . . . the woman's often distorted opinion from the law of forcible rape."" 114 Perhaps the extreme example of this attitude is found in a letter from a Michigan attorney to the author of an article on judicial attitudes towards rape victims:

I note your article in *Judicature* . . . . I also note with great disapprobation and disgust the rancid, fetid and feculent efforts of Women's Libbers and other fascists to change the burden of proof in rape cases to the defendant, who usually had it in practice anyhow. While the prospect of any such change in the law provokes me to vomit, I have a counter proposal to make, which you may convey to the Center for Rape Concern, whatever the hell that is: When a female has induced the prosecutorial authority to institute a charge of rape against a man, and that man is acquitted, without further delay the prosecutrix shall be carried in a cart to the nearest public square and there disembowelled alive, and then hanged by the feet and left to rot in the sun." 115

In summary then, the legal system has developed a set of special rules and procedures, including psychiatric examinations, to govern sex offense cases. The rules and procedures are the outgrowth of a chain of reasoning that begins with the basic premise that rape is easy to charge. This fact is then said to produce many false charges of rape. These false accusations are viewed as dangerous because the rape charge is difficult to disprove and frequently results in convictions from juries carried away by sympathy for the victim. Finally, two basic rationales are offered to explain why women would make false charges in the first place: many women simply lie for personal reasons or they are mentally ill. The question then becomes does this chain of reasoning have any basis in reality?

**REALITY—THE LAW IN PRACTICE**

"I had some thought about this, actually maybe what we need is an instruction that says, 'This particular charge is brought with such difficulty and is so easily defended against

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that you should regard the word of the defendant with caution." 116

The myths inherent in the above chain of reasoning are best dispelled with current statistical data. According to the FBI rape is the most frequently committed violent crime in America as well as the most under reported. 117 Nobody really knows just how many rapes do take place each year because of the reluctance of the victim to report it. Estimates range from only 1 in 20 reporting, to 1 in 4.5. 118

Since the major premise supporting the special treatment accorded rape cases, including the psychiatric examination, is that there are many false charges of rape, this particular premise must be dealt with in some depth. This is a difficult myth to dispell, not because it is true, but because in a way it gives rise to a self-fulfilling prophecy. This is because those who most often make the decision as to whether the victim of rape is lying, and who set up the criteria for making this decision, are usually those who believe most strongly in the myth—male police officers. 119

The police decision that a rape report is false is expressed by "unfounding" the complaint. According to the FBI this means that after investigation the complaint has been found to be "false or baseless." 120 Of the rapes that are reported to the police, FBI records reveal a national average of 15% "unfounded" charges. 121 The extraordinary concern for the au-

116. 1975 Hearings, supra note 58, at 65. This sentiment was echoed in a study of rape in San Francisco. In criticising the Lord Hale-based California cautionary instruction, it stated: "This jury instruction is prejudicial and not based in fact: rape is a charge which is extremely difficult to bring and prosecution data shows that it is easy to defend against." QUEEN'S BENCH FOUNDATION, RAPE VICTIMIZATION STUDY 46 (Final Rep. 1975) (emphasis in original) [hereinafter cited as FINAL RAPE STUDY].

117. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 22, 24 (1975) [hereinafter cited as 1975 UNIFORM CRIME REPORTS]; Comment, supra note 53, at 36. Rape also shows the greatest increase of offenses over the 5 year period since 1970—48%. 1975 UNIFORM CRIME REPORTS, supra at 11.

118. Note, supra note 10, at 1374-75; Comment, supra note 3, at 921.

119. One commentator quotes police investigators as saying that "80% to 90% of the rapes reported are not really rapes." Comment, Police Discretion and the Judgment That a Crime Has Been Committed—Rape in Philadelphia, 117 U. PA. L. REV. 277, 279 n.8 (1968). A San Francisco patrolman is quoted as saying: "Most rape reports are not worth the time they take to write." QUEEN'S BENCH FOUNDATION, RAPE VICTIMIZATION STUDY 53 (Prelim. Rep. 1975) [hereinafter cited as PRELIMINARY RAPE STUDY].

120. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTING HANDBOOK 43 (1974) [hereinafter cited as UCR HANDBOOK]. A strict and narrow definition of this term is given: "If your investigation shows that no offense occurred nor was attempted, the reported offense can be unfounded for UCR purposes." Id.

121. 1975 UNIFORM CRIME REPORTS, supra note 117, at 24.
thenticity of rape reports is exemplified by the fact that up until the most recent issue, the FBI's Uniform Crime Reports have never given the unfounding rate for any crime other than rape. FBI figures carry weight. This unfounding figure is often pointed to as proof of the frequent occurrence of false charges. However, as one commentator noted, rape charges are unfounded for a variety of reasons, most of which have nothing to do with the truth of the charge. Support for this latter view is found in two different nationwide surveys of police departments which disclosed that "a wide variety of unfounding procedures [are] employed ..." One of these reports questioned the integrity of the unfounding decisions: "Some police departments have used the 'unfounded' label to reduce the rate of reported rapes with the stroke of a pen. Others have used this category to reduce the number of open cases. And still others have allowed this label to cover inappropriate, prejudicial judgments by their officers." The other study revealed that only eight percent of the police departments surveyed followed the strict FBI Uniform Reports standards, and unfound on the basis of insufficient evidence only. Others unfound because of too much time between offense and report (18%), lack of victim cooperation (36%), or a combination of insufficient evidence and lack of cooperation (38%). The Uniform Crime Reporting Handbook specifically says that refusal of the victim to prosecute (i.e., an uncooperative victim) is not grounds for unfounding a complaint. It is

122. E.g., Federal Bureau of Investigation, Uniform Crime Reports for the United States 22 (1974). However, in the uniform crime reports released on August 25, 1976, the following figures on unfounding of offenses were given: overall, 4% of the complaints reported to the police are unfounded; violent crimes, 8% unfounded; property crimes, 4% unfounded; rape, 15% unfounded; larceny-theft, 3% unfounded. 1975 Uniform Crime Reports, supra note 117, at 10.

123. E.g., Comment, supra note 119, at 279 n.8. This commentator, however, believes the Federal Bureau of Investigation figures to be "misleadingly low." Id.

124. Comment, supra note 3, at 928-29.


126. Rape Report, supra note 125, at 49. The irrationality of some of these unfounding judgments is illustrated by the Philadelphia Police Department which unfounds most (56%) complaints where the victim refuses to undergo a medical examination, yet the medical information gained from such examinations is included in only 18% of the investigative reports. Comment, supra note 119, at 289, 311.

127. Response by Police, supra note 49, at 44.

128. Yet rape victims do not always report immediately. See Bienen, supra note 38, at 53; Weis & Borges, supra note 37, at 102-03.

129. Response by Police, supra note 49, at 44.

130. UCR Handbook, supra note 120, at 13, 43.
quite clear that the unfounding rate for rape is more a reflection of police officers' (and society's) prejudices than it is of false reports by rape victims.131

Where sophisticated special units are set up to handle sexual assault cases, using more sensitive, better trained investigators, a more accurate picture of the false charges presented to the police develops. The commander of the Rape Analysis Squad in New York City reported an estimated unfounding rate of 2%, no more than the rate for other crimes.132 Furthermore, what false charges there are just don't make it to trial. "The few false reports are disposed of by police investigation and questioning, the prosecutor's interview and polygraph test, and the grand jury investigation. Prosecutors believe this

131. This can be exemplified by comparing the attitudes of the heads of two California urban police department's sexual assault units with their department's respective unfounding rates. Inspector P. Doran, former chief (1975-1977) of the Berkeley Police Department's sex crimes detail said that his department does not unfound unless there is solid evidence that the rape did not occur, even though he might be suspicious of some of the reports. He also stated that he felt that the amount of false reports of rape was similar to that of other crimes, such as robbery. The department unfounded less than 1% of its rape cases in 1975 (1 out of 105) and none of its rape complaints in 1976 (115). Interview with Inspector Phillip E. Doran, Chief, Sex Crimes Detail, Berkeley Police Department of Berkeley, Cal., in Berkeley, Cal. (Feb. 21 & Mar. 7, 1977). On the other hand Sergeant W. Kivett, senior investigator in Oakland's Police Department, stated that his Department had no consistent policy concerning unfounding and that it depended on the individual investigator. He listed factors that would be considered in unfounding: drinking by the victim, insufficient evidence, lack of cooperation by the victim (i.e., victim does not recontact the unit, does not answer the letter the unit sends her), and time between offense and report (if excessive). Interview with Sgt. W. Kivett, senior investigator, Sexual Assaults Detail, Oakland Police Department, in Oakland, Cal. (Feb. 23, 1977). The Oakland Police Department's unfounding rate in 1976 was 23% (70 out of 310), and in 1975, 16% (48 out of 299). City of Oakland, Inter-Office Letter, Re: 1976 Annual Crime Summary (Feb. 1, 1977).

132. Comment, supra note 53, at 49. The City of San Francisco, which has a special Sex Crimes Prosecution Team in addition to its Sex Crimes Detail, has an unfounding rate of about 4% (5 out of 119, for the first 4 months of 1975), Final Rape Study, supra note 116, at 27, a rate comparable to the F.B.I. rate for all crime complaints. See, note 122 supra. Bay Area Women Against Rape, which as a well publicized crisis line could expect to receive its fair share of calls from mentally disturbed persons and cranks, found that about 4% of their calls reporting a sexual assault (in 1976, 11 out of 262) were questionable or suspicious. Of these 11, 6 were from women and 5 were from men and/or men pretending to be women. Hands Off!, BAWAR Newsletter, March, 1977, at 16 (data compiled by author of this article).

In view of the widely held distrust of child victims of sexual assault and the tendency to dismiss their reports as fantasy, it is interesting to note that a psychiatric study of children aged 2 to 12 years who reported sexual assaults to the Philadelphia police showed a false report rate of just over 6%. Peters, Children Who Are Victims of Sexual Assault and the Psychology of Offenders, 30 AM. J. PSYCHOTHERAPY 398, 414, 416 (1976).
screening process insures that no fabricated cases get to trial. Instead, many bona fide cases are dropped during the screening process.

A second link in the previously mentioned chain of reasoning is the belief that a rape charge is difficult to defend against. Whatever its relevance in Hale's time, this myth is totally inapplicable today. The conviction rate for forcible rape is the lowest of any violent crime; only one out of seven reported rapes results in a conviction. In California, there were 8,349 rapes reported to the police in 1973; 660 were convicted; of those 660 convicted, only some 300 received any jail time, and of those, only 145 went to state prison. Of the FBI's four "violent crimes," murder, forcible rape, robbery, and aggravated assault, forcible rape has the highest rate of acquittal.

Yet another reason illustrating that Hale's "old saw" is not applicable today is the radically changed position of the criminal defendant since 17th century England. In People v. Rincon-Pineda, the California Supreme Court discussed this fact at length, contrasting the many rights the defendant now has that he did not have then: The defendant is now competent to testify in his own behalf, the presumption of innocence, guilt proven beyond a reasonable doubt, right to present witnesses and compel their attendance, right to counsel, etc. In light of the foregoing advances the court concluded that "the spectre of wrongful conviction, whether for rape or for any other crime, has led our society to arm modern defendants with the potent accoutrements of due process which render the additional constraint of Hale's caution superfluous and capricious.

As to that belief that juries are typically sympathetic to rape victims, Los Angeles County Trials Division chief attorney remarked: "Jurors are usually twelve hung-up people who won't convict in a rape case if they can avoid it . . . . Legal theory is not legal reality." The chief attorney is not alone in his belief; it is strongly echoed by Kalven and Zeisel's exhaustive empirical study of juries in America. The authors wrote:

133. Comment, supra note 53, at 49-50 (emphasis added).
134. Id. at 37.
137. Id. at 877-78, 538 P.2d at 260-61, 123 Cal. Rptr. at 125-29.
138. Id. at 878, 538 P.2d at 261, 123 Cal. Rptr. at 129.
139. N. GAGER & C. SCHURR, supra note 43, at 182.
“The jury . . . does not limit itself to this one issue [consent to intercourse]; it goes on to weigh the woman's conduct in the prior history of the affair. It closely, and often harshly, scrutinizes the female complainant and is moved to be lenient with the defendant whenever there are suggestions of contributory behavior on her part.”

There are a number of reasons why juries demonstrate a reluctance to sympathize with rape victims. First, there is a widespread societal belief that the rape victim is often at fault; that she is responsible for her attack and not an innocent victim. As a result, juries do not perceive the behavior of her attacker as "real" rape. Second, there is an equally widespread societal myth that "nice" girls do not get raped. The impact of this myth extends beyond juries to others involved in the judicial system. For example, in situations where there was a prior victim-offender relationship and it is reasoned that the victim was "asking for it," judges have described the situation as "felonious gallantry" and "assault with failure to please." One study found a number of defense attorneys who felt that forced sexual intercourse "with a date, an acquaintance or an ex-boyfriend constituted a personal problem, certainly not a crime.”

Along similar lines, most prosecutors nationwide feel that the victim's past sexual history in general is a major factor in jury deliberation. This proposition is

141. See Response by Police, supra note 49, at 139; Reisner, supra note 49, at 49.
142. Weis & Borges, supra note 37, at 85.
143. Id.
144. See Bohmer, Judicial Attitudes Towards Rape Victims, 57 Judicature 303, 304-05 (1974).

The problem of judicial attitudes towards rape victims has been highlighted recently in the national press. A prime example is the Wisconsin judge who said that rape was a normal reaction to prevalent sexual permissiveness and women's provocative clothing. San Francisco Chronicle, May 27, 1977, at 1, col. 1. Further, a California justice received considerable publicity for stating in an appellate court decision that it is not unreasonable for a man to expect a lone woman hitchhiker in a metropolitan area to consent to sexual advances. Id. July 23, 1977, at 2, col. 2. In light of the Mayberry decision concerning "reasonable" mistake of fact, discussed supra, this is a particularly alarming point of view—it would in effect license the rape of women hitchhikers. However, much of the objectionable language in the opinion was later deleted. See Los Angeles Times, Aug. 10, 1977, at 2, col. 1.
145. Preliminary Rape Study, supra note 119, at 61. Yet, it has been noted that the psychiatric harm to the victim is usually greater when the rapist is an acquaintance, rather than a stranger. Bienen, supra note 38, at 54; Weis & Borges, supra note 37, at 99-100.
146. Response by Prosecutors, supra note 49, at 79.
borne out by Kalven and Zeisel. They described two kinds of rape: 1) aggravated—cases where there was extrinsic violence, more than one assailant, or where the victim and defendant were complete strangers; and 2) simple—all other cases. In comparing verdicts on the same cases rendered by a jury and a judge, they came up with some "startling" results: "The jury convicts of rape in just three out of forty-two cases of simple rape; further, the percentage of disagreement with the judge on the major charge is virtually one hundred percent (20\textonehalf out of 22). The figures could not be more emphatic." Thus, the jury frequently acquits defendants where a theoretically more neutral judge would convict.

As the reality of the law in practice becomes clear, the weaknesses in the chain of reasoning supporting the special rape procedures begin to emerge. In fact no link in the chain seems to find support in actual practice. Rape is not easy to charge and frequently is easy to disprove. The number of false rape charges compares favorably with the false charges of other crimes. The jury far from being sympathetic with the victim, more often is an ally of the defendant. Despite the inherent weaknesses in the chain of reasoning supporting them, the special rape procedures continue to be utilized. These procedures, including the psychiatric examination, add to the ordeal that attends the crime itself. It is important then, to understand how the whole system functions from the victim's point of view.

**THE VICTIM'S INTERACTION WITH THE CRIMINAL JUSTICE PROCESS**

Though it may be now considered trite to say this, it is still true that the whole criminal justice process rapes the victim all over again. It is certainly not a novel point of view. As quoted in one article: "Rape is the only crime in which the victim is doubly violated, first by the attacker, and then by

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147. H. Kalven & H. Zeisel, supra note 140, at 252.
148. Id. at 253-54.
149. But see Bohmer, supra note 144.
150. Bay Area Women Against Rape (BAWAR), a rape crisis center in Berkeley, Cal. has compiled some statistical data about rape and the victim's interaction with the criminal justice process. See Hands Off!, BAWAR Newsletter, March, 1977, at 13-16. This data was compiled by the author of this article and appears in app. A, infra. BAWAR is "[O]ne of the earliest and most successful rape crisis centers," N. Gager & C. Schurr, supra note 43, at 264, and deals with well over 300 rape victims per year.
151. See Weis & Borges, supra note 37, at 103. See also Berger, Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom, 77 COLUM. L. REV. 1 (1977).
The victim must first face the indignities of her treatment by the police, then the hospital, and perhaps worst of all, the court system. Even the California Supreme Court acknowledged that "the initial emotional trauma of submitting to official investigatory processes" may be one of the reasons victims choose not to report rape. Police treatment of rape victims is variable, depending on many different factors in the rape, the victim, the individual officers, etc. A significant proportion of rape victims report a negative reaction to their treatment by the police, which many rape crisis centers attribute as a cause of victim nonreporting. In fact, victims frequently report that their encounters with police, district attorneys and courtroom personnel were more traumatic than the rape incident itself. At the hospital, the rape victim tends to be treated as a piece of evidence rather than as a person: "[F]or the woman coming in [to the hospital] it really is almost like a second rape. She has been in a situation [rape] where she has been powerless and been given orders and made to do things. She walks into the hospital and the same thing happens again."

For the victim, the experience with the court and its accouterments often emerges as the greatest ordeal. Again, she is often regarded as simply a piece of evidence. Victims may refuse to prosecute in order to "avoid having to relive a traumatic and humiliating experience for the benefit of the judge and jury." The California Supreme Court has also observed that the embarrassment of a trial is one of the primary reasons

152. Comment, supra note 53, at 37.
153. Note, supra note 39, at 1552.
156. Preliminary Rape Study, supra note 119, at 20 (41% of victims interviewed found the police to be callous, unbelieving or indifferent); Approach Associates, Sexual Assault: The Police Response 37 (1976) (a training manual prepared for the Palo Alto Police Dept.) (a study of Palo Alto victims found that a third of them showed strongly negative attitudes about their experience with police). See also app. A infra.
158. Bohmer, supra note 144, at 303.
159. 1975 Hearings, supra note 58, at 156 (remarks of Roberta O'Neale); accord, Note, supra note 39, at 1553 n.10.
160. 1975 Hearings, supra note 58, at 158.
161. Bohmer, supra note 144, at 303.
162. Note, supra note 10, at 1375.
why the victim does not report the crime.163 A large part of the trauma of going to court is the feeling that the victim herself is on trial.164 In most cases the court seems to place the woman in the position of having to prove herself innocent.165 This atmosphere of disbelief and lack of support, as exemplified by, among other things, the practice of some agencies in using lie detector tests, contributes to the victim's fear of testifying, and ultimately to her decision not to prosecute.166 According to the authors of one article, "the extent of the trauma suffered by the victim in her contact with the legal system is in large measure due to the attitudes and consequent treatment of the victim by the law enforcement and court personnel with whom she deals."167

To have to go through all that a rape victim goes through and then to have to undergo a psychiatric examination as well, seems "a bit much," as one district attorney commented.168 This sort of examination provides one more invasion into the victim's emotional integrity. It is also an additional attack on the victim's credibility. Something like the examination might be just what it would take to tip the balance and cause the victim to decide not to go through with the prosecution. In view of this hazard, the need for the examination must be carefully weighed against the advantages of banning it entirely.

THE PROBLEMS OF THE PSYCHIATRIC EXAMINATION

The psychiatric examination of sex offense victims raises a number of problems to the point where banning them entirely can seriously be considered.

An initial problem raised by the examination is its actual value to the judicial process even when conducted by an expert. The thrust of the examination is to determine whether the victim is capable of telling the truth, yet it has been said that "[a] good poker player probably knows better than a psychiatrist whether a person is lying."169 Psychiatrists are not lie det-

164. A. BURGESS & L. HOLMSTROM, supra note 155, at 201.
165. Bohmer & Blumberg, Twice Traumatized: The Rape Victim and the Court, 58 JUDICATURE 391, 398 (1975).
168. Interview with Howard Janssen, Deputy District Attorney of Alameda County, in Oakland, Cal. (Sept. 20, 1976).
169. Slovenko, supra note 11, at 21.
ectors, as even the most ardent supporters of psychiatric examinations will admit. In fact, "[t]here is no question that psychiatric judgments are far less reliable and valid than polygraph judgments."\textsuperscript{170} Where false testimony has its basis in something other than psychopathology, a psychiatric examination will be of no use.\textsuperscript{171} The value of the examination is further weakened by the circumstances under which it is conducted. Slovenko makes a cogent argument that there are a number of factors in the legal setting which make it difficult, if not impossible, to obtain a reliable psychiatric evaluation. He says that "[a] psychiatric evaluation usually rests on the complete trust between the patient and psychiatrist."\textsuperscript{172} However, he notes that in a courtroom setting a witness may feel attacked, bringing defense mechanisms into play, which will shut out or distort pertinent psychiatric material.\textsuperscript{173}

However, proponents of the examination generally make no claim for lie detection. They only credit the psychiatrist with the ability to observe a person and perceive mental illness that would affect the ability to tell the truth. As pointed out by the authors of an article on psychiatrists as expert witnesses, "the usefulness of psychiatric evidence . . . is measured by the probability that what he has to say offers more information and better comprehension of the human behavior which the law wants to understand."\textsuperscript{174} Despite the claims of the proponents, it has been strongly argued that psychiatric judgments are no more reliable or valid than those made by laymen, and that such judgments are not so very different from those that laymen are accustomed to making.\textsuperscript{175} In fact, there are those who argue that psychiatric judgments are neither reliable, nor valid in diagnosing even mental illness.\textsuperscript{176} The California Supreme Court itself, observed: "It must be conceded that psychiatrists still experience considerable difficulty in confidently and accurately diagnosing mental illness."\textsuperscript{177} Similarly, one study

\textsuperscript{171} 26 IND. L.J. 98, 102 n.17 (1950).
\textsuperscript{172} Slovenko, supra note 11, at 20.
\textsuperscript{173} Id. at 15.
\textsuperscript{174} Diamond & Louisell, The Psychiatrist as an Expert Witness: Some Rumina-
tions and Speculation, 63 MICH. L. REV. 1335, 1342 (1965).
\textsuperscript{175} Ennis & Litwak, supra note 170, at 707, 710, 742.
\textsuperscript{176} Id. at 699-711.
seems to indicate that they are also unable to detect sanity.178 Ennis and Litwak go even farther: "It is important to understand that psychiatric judgments are not only unreliable with respect to the ultimate diagnoses, but lack consistency even in the perception of the presence, nature, and severity of symptoms."179

Even if one concedes that psychiatric examinations have some value in the court process, they raise an additional problem; i.e., how many interviews are necessary to enable a psychiatrist to come to a valid conclusion about a witness’ credibility? One commentator who favors the examinations notes that the determination of credibility is an exceedingly complex task.180 In this author’s opinion no single conventional psychiatric interview is a sufficient basis for any diagnosis of credibility; that an intensive history is necessary; and that the usual one to two hour psychiatric interview is insufficient.181 It also must be established that the techniques and/or theories on which the expert bases his opinions are generally accepted in the field.182

The problem is that the actual practice in the courts rarely, if ever, meets these ideal requirements. Diamond and Louisell pin-pointed this difficulty with forensic psychiatry when they said: "The psychiatric expert is apt not to be a very wise man, but rather a possessor of technical knowledge of some depth, but little breadth. He seldom comprehends or is sympathetic to the legal process."183

Another problem raised by the examination is that courts assume that psychiatrists provide "neutral expertise rather than professional viewpoint."184 In reality, this assumption of impartiality is open to question.185 According to Ennis and Litwak, "the so called 'independent' psychiatrist, despite claims to the contrary does not exist. Furthermore, the judgments of even 'independent' psychiatrists are subject to bias and error."186 The misuse of this expertise is evidenced by some of

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179. Ennis & Litwak, supra note 170, at 706.
180. Tuchler, supra note 9, at 327.
181. Id. at 328, 336. See also Ennis & Litwak, supra note 170, at 724.
182. Juvelier, supra note 9, at 658.
183. Diamond & Louisell, supra note 174, at 1342.
184. Id. at 1344 (emphasis deleted).
185. Id. Unfortunately, psychiatrists as well as the courts make this assumption of impartiality. See J. MacDonald, Psychiatry and the Criminal 58 (1969).
186. Ennis & Litwak, supra note 170, at 746. For an in depth discussion of this
the practices approved by courts. In one case a court approved sending victims hundreds of miles away for an interview with a defense psychiatrist. Another implied a twenty minute interview was sufficient to establish a witness' credibility. The inference to be gained from yet another case was that merely seeing a psychiatrist was relevant evidence on credibility.

In view of the problems raised by the psychiatric examinations and the judgments based on them, it is not surprising that they have many critics. The Oregon Supreme Court makes one compelling argument against court ordered psychiatric examinations: "[I]f a witness was willing to submit to such examination no necessity for a court order would exist, and . . . the results of a psychiatric examination of a witness unwilling to volunteer for such an examination would be questionable at best." This view is echoed by a commentator discussing the psychiatric examination of the defendant in a sexual offense case: "Moreover, if the defendant is compelled to talk, the information gained is of little value. From a medical point of view, any psychiatric evaluation made under threat of contempt is invalid." There is another strong argument made by the opponents of the psychiatric examination. Assuming a psychiatrist can tell if a person is subject to delusions, the fact that this person is subject to delusions does not prove that she is not the victim of a sex crime.

In a similar vein, opponents of the psychiatric examinations reason that they can lead to a battle of the experts which thoroughly dissects the victim's psyche in the courtroom. Chief Judge Bazelon lists some of the dangers the examination can pose for the peace of mind of the victim:

[A] psychiatric examination may seriously impinge on a witness' right to privacy; the trauma that attends the role of complainant to sex offense charges is sharply increased

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192. Comment, Sexual Psychopathy—A Legal Labyrinth of Medicine, 36 Nev. L. Rev. 320, 336 (1957) (emphasis added).
193. Note, supra note 11, at 1143.
194. Id. at 1142. As this commentator noted: "Some might find rape itself hardly more traumatic." Id.
by the indignity of a psychiatric examination; the exami-
nation could itself serve as a tool of harassment; and the
impact of all these considerations may well deter the vic-
tim of such a crime from lodging any complaint at all.\textsuperscript{184}

There are so many possible dangers, it is hard to do more
than just list them, rather than discuss them at length. The
court in \textit{Ballard} in fact does just that in a footnote:

A psychiatrist's testimony on the credibility of a witness
may involve many dangers: The psychiatrist's testimony
may not be relevant; the techniques used and theories ad-
vanced may not be generally accepted; the psychiatrist
may not be in any better position to evaluate credibility
than the juror; difficulties may arise in communication
between the psychiatrist and the jury; too much reliance
may be placed upon the testimony of the psychiatrist; par-
tisan psychiatrists may cloud rather than clarify issues;
the testimony may be distracting, time-consuming and
costly.\textsuperscript{185}

Considering the list, it is almost surprising that the court still
decided to mandate the court ordered examinations.

One final, very real danger is something that happens all
too often in rape cases—the distraction of the jury's attention
from the defendant to the mental state of the victim/witness.\textsuperscript{186}
Psychiatric testimony exacerbates an already severe problem
of focusing on the victim to the exclusion of the perpetrator—it
becomes a real question of who's on trial. The jurors often get
confused. Along similar lines, there is the possibility for abuse
by the defense, of using the pretext of examining credibility to
suggest to the jury that the victim is "crazy" or a "kook" and
thus deserved what she got.\textsuperscript{187}

It should be abundantly clear that the court ordered psy-
chiatric examination is subject to a host of problems. The ques-
tion is what to do about it.

\textsuperscript{184} United States v. Benn, 476 F.2d 1127, 1130 (D.C. Cir. 1973) (rape, mentally
retarded 18 year old victim/witness).
\textsuperscript{185} 64 Cal. 2d at 175 n.10, 410 P.2d at 848 n.10, 49 Cal. Rptr. at 312 n.10.
\textsuperscript{186} Comment, \textit{Psychiatric Examinations of Witnesses: Standards, Timing and
\textsuperscript{187} It should be noted that such defense maneuvers are facilitated by the fact
that many women today have had some psychiatric care. In a Philadelphia study, over
25% of the rape victims had received some sort of psychiatric assistance prior to the
rape incident, even though over 70% of the victims reported an income of less than
$9000 per year. See Peters, Meyer & Carrol, \textit{The Philadelphia Assault Victim Study
118, table 112 (June 30, 1976), cited in Bienen, supra note 75.}
CONCLUSION

Presently, at the trial level, motions requesting court ordered psychiatric examinations are made fairly often, but only infrequently granted. It has been suggested that judges avoid granting them because it puts them on a limb for the defendant or because of raised consciousness on the issue of rape. In general, district attorneys also dislike the rule, largely because of its effect on the victim. However, due to the radical changes in the California rape laws, the Ballard examination is one of the few special weapons left in the defense arsenal. Therefore, it is likely that the future will show an increase in the use of, or at least requests for, this examination.

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198. In Alameda County, in 1976, approximately 12 Ballard motions were made, of which 2 to 3 were granted. Interview with Alice Sullivan, Deputy District Attorney (Calendar Deputy) of Alameda County, in Oakland, Cal. (Mar. 3, 1977). In Contra Costa County, in 1976, about 7 to 9 motions were put forward, of which 3 or 4 went to hearing, and of those 2 were granted. Interview with Dale Miller, Deputy District Attorney (former Calendar Deputy) of Contra Costa County, in Martinez, Cal. (Mar. 7, 1977). Somewhat more extensive data was available for San Diego County concerning Ballard motions:

<table>
<thead>
<tr>
<th>Year</th>
<th>Motions Made</th>
<th>Motions Granted</th>
</tr>
</thead>
<tbody>
<tr>
<td>1975</td>
<td>18</td>
<td>4</td>
</tr>
<tr>
<td>1976</td>
<td>24</td>
<td>4</td>
</tr>
<tr>
<td>1977**</td>
<td>7</td>
<td>2</td>
</tr>
</tbody>
</table>

*This data represents approximately 60% of the motions made, however the ratio of motions granted remains approximately the same for the remaining 40% for which data was unavailable.

**January and February only.

Letter from Peter C. Lehman, Deputy District Attorney (Chief Appellate Division) of San Diego County, to author (March 1977).

In San Francisco County, where about 150 rape cases are filed by the District Attorney's office each year, approximately 12 to 15 Ballard motions were made in 1976, of which 1 or 2 were granted. Telephone interviews with Robert Dondero, Deputy District Attorney (head of the Sex Crimes Prosecution Team) of San Francisco County (June 8, 1977), and Maxine Mackler, Deputy District Attorney (former head of the Sex Crimes Prosecution Team) of San Francisco County (May 31, 1977). Mr. Dondero commented that the defense rarely made an adequate showing of justification.

199. Interview with Howard Janssen, Deputy District Attorney of Alameda County, in Oakland, Cal. (Sept. 20, 1976); Interview with Dick Eigelhart, Deputy District Attorney of Alameda County, in Oakland, Cal. (Sept. 3, 1976); Interview with Roger Hughes, Deputy District Attorney of Contra Costa County, in Richmond, Cal. (Aug. 30, 1976).

200. Id.

201. See notes 55-68 and accompanying text supra.
It can be argued, however, that the changes in the law should mandate a reconsideration of Ballard. It is reasonable to assume that the changes in the evidence code and jury instructions show a legislative intent to treat rape victims just like any other victim of crime and to try to encourage their cooperation with the criminal justice system.

Furthermore, the California Supreme Court evinced a similar intent, when, in striking down the former cautionary instruction, they asserted that Hale’s views were outdated in the light of the panoply of rights now afforded the criminal defendant.\(^2\)\(^0\)\(^2\)

Clearly, the examination procedures are unacceptable in their present form as defined by Ballard-Russell. Currently, the trial judge has wide discretion to order the prosecutrix to undergo a psychiatric examination on the question of her credibility, when he/she feels there is an emotional condition involved related to credibility, which laymen could not detect.\(^2\)\(^0\)\(^3\) Also, this discretion is to be exercised liberally in favor of the defendant.\(^2\)\(^0\)\(^4\) One reform option is to eliminate the examination entirely given the questionable value of psychiatric diagnosis to the sex offense case.\(^2\)\(^0\)\(^5\) This is perhaps an unrealistic expectation of the criminal justice system at this time, since the belief is strongly entrenched that witness’ may possess mental or emotional conditions which affect credibility which are beyond the comprehension of laymen.\(^2\)\(^0\)\(^6\)

If the examination is to be retained, there is a need to extend its use to all crimes and all witnesses, eliminating its position as a special rape rule. As one commentator noted: “The goal of reform in the use of evidence of the character and reputation of the prosecutrix in a rape case should be to abolish the distinction between rape victims and victims of other crimes.”\(^2\)\(^0\)\(^7\) This excellent sentiment is equally applicable to the use of court ordered psychiatric examinations in sex offense cases.

If the examination is to be retained, there is also a need for some strong qualifications. First, there should be a severe restriction on the discretion of the trial judge, and that discre-

\(^2\)\(^0\)\(^2\). See notes 119-137 and accompanying text supra.
\(^2\)\(^0\)\(^3\). See notes 20-30 and accompanying text supra.
\(^2\)\(^0\)\(^4\). Id.
\(^2\)\(^0\)\(^5\). See notes 169-196 and accompanying text supra.
\(^2\)\(^0\)\(^6\). See notes 20-30 and accompanying text supra.
\(^2\)\(^0\)\(^7\). Comment, supra note 53, at 51.
tion should not be liberally exercised in favor of the defense. This would check the proliferation of the motion, minimizing the adverse effects on victims.\footnote{208} Second, the psychiatrist should always be court appointed and never chosen, or suggested, by the parties. While true impartiality may be an unreachable goal, at least the court can make an effort to reduce the level of bias involved. Nor should the court allow court appointment to mask behind-the-scenes manipulations by the parties. Third, safeguards should be set up to insure that the victim interview is in sufficient depth so as to provide a competent psychiatric judgment. This will enhance the reliability of any opinion offered as a result of the examination. Fourth, procedures should be established to provide well-qualified appointed psychiatrists with expertise on and experience with victims. This suggestion could be implemented by having a panel of specially trained psychiatrists (approved by a women’s group or crisis center in the case of rape victims) that the judge could choose from. This would serve the dual function of further enhancing the validity of the examination and easing the impact of the examination of the victim. Finally, and most importantly, if the examination is to be retained, studies should be instituted to ascertain more accurately the usefulness to, and the effect on, the legal system of such psychiatric testimony, and whether such testimony has any validity.

\footnote{208. See notes 193-194 and accompanying text supra.}
1. Type of assault reported:

<table>
<thead>
<tr>
<th>Year</th>
<th>Rape</th>
<th>Attempted Rape</th>
<th>Forced Oral Copulation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1975 (N = 221)</td>
<td>88%</td>
<td>12%</td>
<td>0%</td>
</tr>
<tr>
<td>1976 (N = 251)</td>
<td>85%</td>
<td>13%</td>
<td>2%</td>
</tr>
</tbody>
</table>

2. Relationship of attacker to victim:

<table>
<thead>
<tr>
<th>Year</th>
<th>Known*</th>
<th>Unknown</th>
</tr>
</thead>
<tbody>
<tr>
<td>1975 (N = 189)</td>
<td>43%</td>
<td>57%</td>
</tr>
<tr>
<td>1976 (N = 213)</td>
<td>33%</td>
<td>67%</td>
</tr>
</tbody>
</table>

*“Known” includes anyone from relative, close friend, to casual, brief acquaintance.

3. Location of the rape:

<table>
<thead>
<tr>
<th>Year</th>
<th>Victim's Home</th>
<th>Rapist's Home</th>
<th>Outside</th>
<th>Car</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>1975 (N = 170)</td>
<td>42%</td>
<td>9%</td>
<td>25%</td>
<td>12%</td>
<td>12%</td>
</tr>
<tr>
<td>1976 (N = 198)</td>
<td>45%</td>
<td>15%</td>
<td>14%</td>
<td>15%</td>
<td>12%</td>
</tr>
</tbody>
</table>

*This is the place of the actual occurrence of the rape, and may or may not be the location of the first contact between the victim and her attacker.

4. Method of attack used:

<table>
<thead>
<tr>
<th>Year</th>
<th>Force*</th>
<th>Weapon**</th>
<th>Trick</th>
</tr>
</thead>
<tbody>
<tr>
<td>1975 (N = 154)</td>
<td>57%</td>
<td>40%</td>
<td>3%</td>
</tr>
<tr>
<td>1976 (N = 172)</td>
<td>52%</td>
<td>44%</td>
<td>4%</td>
</tr>
</tbody>
</table>

*“Force” means physical force was used and no weapon was involved.

**“Weapon” means a weapon such as a gun or knife was used; force may or may not have also been used.
5. Victim resistance to the attack, correlated with victim injury:

<table>
<thead>
<tr>
<th>Year</th>
<th>Injured* Resisted**</th>
<th>Didn't Resist</th>
<th>Not Injured Resisted</th>
<th>Didn't Resist</th>
</tr>
</thead>
<tbody>
<tr>
<td>1975 (N = 99)</td>
<td>42%</td>
<td>12%</td>
<td>10%</td>
<td>35%***</td>
</tr>
<tr>
<td>1976 (N = 89)</td>
<td>36%</td>
<td>6%</td>
<td>8%</td>
<td>51%</td>
</tr>
</tbody>
</table>

**“Injured” includes all injuries, minor or major, beyond very minor scratches or bruises.

***“Resisted” includes any physical resistance; but does not include arguing, screaming, or running away.

***May not add up to 100% due to rounding off.

6. Reporting of rape to the criminal justice system:

<table>
<thead>
<tr>
<th>Year</th>
<th>Reported*</th>
<th>Didn't Report</th>
</tr>
</thead>
<tbody>
<tr>
<td>1975 (N = 190)</td>
<td>68%</td>
<td>32%</td>
</tr>
<tr>
<td>1976 (N = 218)</td>
<td>67%</td>
<td>33%</td>
</tr>
</tbody>
</table>

*Does not include anonymous reports to the police by third parties.

7. Treatment of the reporting victim by the criminal justice system*:

<table>
<thead>
<tr>
<th>Year</th>
<th>Police</th>
<th>Hospital/Doctor</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Good</td>
<td>Fair</td>
</tr>
<tr>
<td>1975 (N = 77)</td>
<td>61%</td>
<td>12%</td>
</tr>
<tr>
<td>1976 (N = 92)</td>
<td>40%</td>
<td>25%</td>
</tr>
</tbody>
</table>

*Data on victims' treatment by the courts and their personnel was insufficient to draw any significant conclusions from, but appeared as mixed as that for the police and the hospital. (Most victims have contact with a rape crisis center before they go into the court system).